Malayan Banking Berhad v Ng Man Heng

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO (MT–1) 24–2216 OF 2002
SYED AHMAD HELMY J
20 AUGUST 2004

Civil Procedure — Reciprocal enforcement of foreign judgments — Setting aside of foreign judgments — Registration of foreign judgment in local courts — Grounds to challenge application for registration of foreign judgment — Whether valid — Service — Foreign writ of summons — Whether foreign writ of summons could be served personally

This was the judgment creditor's summons for the registration of a foreign judgment (ie from the Singapore High Court) under the provisions of the Reciprocal Enforcement of Judgments Act 1958 ('the Act'). The judgment creditor had earlier filed an action in the High Court of the Republic of Singapore. As the judgment debtor was ordinarily a resident outside the jurisdiction of the Singapore High Court, an order for leave to serve the writ in Malaysia was granted. The judgment creditor served the writ on the judgment debtor personally and later obtained a summary judgment which the judgment creditor sought to register as a judgment of this court under the Act. The judgment debtor challenged the judgement creditor's application based on three grounds, namely: (i) the service of the order for service of the writ of summons out of jurisdiction together with the writ of summons through Messrs Shook Lin & Bok contravened O 65 r 2 of the Rules of the High Court 1980 ('RHC'); (ii) regarding the illness of the judgment debtor and illiteracy of the judgment debtor in both English and Bahasa Malaysia; and (iii) that the judgment creditor misrepresentation and/or induced the judgment debtor to sign the guarantee.

Held, allowing judgment creditor's application:

(1) Order 65 r 2 of the RHC only applies when the minister receives a letter of request from a foreign tribunal seeking assistance to serve a foreign process on a person in Malaysia, and its ambit does not extend beyond this. It does not contain a peremptory order to foreign tribunals to send a request to the Minister in every case where a foreign process is to be served on a defendant in Malaysia. The service of the writ on the judgment debtor in Malaysia through a private agent is proper and valid (see paras 48, 49 and 52).

(2) The grounds on which the registration of a foreign judgment is disallowed are stated in s 5(1) the Act. The judgment debtor's alleged illness or illiteracy or the allegation that there was inducement to sign the guarantee through misrepresentation was not a ground recognized in s 5(1) of the Act to disallow the registration of a foreign judgment (see para 62).

[**Bahasa Malaysia summary**

Ini adalah saman pemiutang penghakiman untuk pendaftaran penghakiman luar negara (iaitu daripada Mahkamah Tinggi Singapura) di bawah peruntukan Akta Penguatkuasaan Penghakiman Bersaling 1958 ('Akta tersebut'). Sebelum ini, pemiutang penghakiman telah memfailkan satu tindakan di Mahkamah Tinggi Singapura. Oleh kerana penghutang penghakiman bermastautin di luar bidang kuasa Mahkamah Tinggi Singapura, perintah membenarkan untuk menyampaikan writ tersebut di Malaysia diberikan. Pemiutang penghakiman telah menyampaikan writ tersebut secara diri dan kemudian mendapatkan penghakiman terus, di mana pemiutang penghakiman sekarang cuba untuk cuba untuk mendaftarkan penghakiman tersebut sebagai penghakiman mahkamah ini mengikut peruntukan di bawah Akta tersebut. Penghutang penghakiman mencabar permohonan pemiutang penghakiman berdasarkan kepada tiga alasan: (i) bahawa penyampaian perintah untuk menyampaikan writ saman di luar bidang kuasa dan writ saman melalui firma peguambela dan peguamcara, Tetuan Shook Lin & Bok bertentangan dengan A 65 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (ii) berdasarkan pada penghutang penghakiman tidak sihat dan buta huruf dalam bahasa Inggeris dan bahasa Malaysia; (iii) bahawa pemiutang penghakiman salah nyata dan/atau mendorong penghutang penghakiman untuk menandatangani gerenti tersebut.

Diputuskan, membenarkan permohonan pemiutang penghakiman:

(1) A 65 k 2 KMT hanya terpakai apabila menteri menerima surat permohonan dari tribunal luar negara minta bantuan untuk menyerahkan proses luar negara kepada seorang yang tinggal di Malaysia dan pemakaiannya tidak melebihi daripada ini. Ia tidak mempunyai perintah yang tidak boleh diingkari kepada semua tribunal luar negara untuk menghantar permohonan kepada menteri dalam semua kes di mana proses luar negara harus disampaikan kepada defendan di Malaysia. Penyampaian writ tersebut kepada penghutang penghakiman di Malaysia melalui agen persendirian adalah betul dan sah (lihat perenggan 48, 49 dan 52).

(2) Alasan-alasan di mana pendaftaran penghakiman luar negara tidak dibenarkan jelas dinyatakan di dalam s 5(1) Akta tersebut. Alasan penghutang penghakiman bahawa beliau tidak sihat dan buta huruf terhadap Bahasa Inggeris dan Bahasa Malaysia dan alasannya bahawa beliau didorong oleh pemiutang penghakiman untuk menandatangani gerenti tersebut melalui salah nyataan adalah bukan alasan yang diterima oleh Akta tersebut untuk tidak membenarkan pendaftaran penghakiman luar negara (lihat perenggan 62).]

Notes

For cases on reciprocal enforcement of foreign judgments, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5042–5056

Cases referred to

Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The "Vrontados") [1982] 2 Lloyd's Rep 241 (refd)
Bank of India v Trans Continental Commodity Merchants Ltd, & Anor [1986] 2 MLJ 342 (refd)
Blohn v Desser [1962] 2 QB 116 (refd)
British Linen Co v Drummond (1830) 10 B & C 903 (refd)
Commerzbank (South East Asia Ltd) v Tow Kong Liang [2002] 2 MLJ 353 (refd)
De la Vega v Vianna (1830) 1 Barn & Adol 284 (refd)
Dobson v Festi, Rasini & Co (1891) 2 QB 92 (refd)
Ferrarini SpA & Ors v Magnol Shipping Co Inc (The "Sky One") [1988] 1 Lloyd's Rep 238 (refd)
Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd [2000] 2 SLR 717 (refd)
MBf Finance Bhd v Yong Yet Miaw & Anor [1991] 2 MLJ 320 (refd)
Melan v Duke de Fitzjames (1797) 1 Bos & P 138 (refd)
Ngan Chin Wen v Panin International Credit (S) Pte Ltd [2003] 3 MLJ 279 (distd)
Nouvion v Freeman (1889) 15 App Cas 1 HL (refd)
Ong & Co Pte Ltd v YL Chow Carl [1987] 1 SLR 304 (refd)
Patrick v Shedden (1853) 2 E & B 14 (refd)
Paul v Roy (1852) 15 Beav 433 (refd)
Plummer v Woodburne (1825) 4 B & C 625 (refd)
Ralli v Angullia (1917) 15 SSLR 33 (refd)
Re Macartney, Macfarlane v Macartney (1921) 1 Ch 52 (refd)
Richardson v Mellish (1824) 2 Bing 229 (refd)
Saeed U Khan v Lee Kok Hooi [2001] 5 MLJ 416 (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211 (refd)
Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146 (refd)
The Aspinall Curzon Ltd v Khoo Teng Hock [1991] 2 MLJ 484 (refd)
Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua [2001] 5 MLJ 256 (refd)
United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (refd)
Vaudrey v Nathan (1928) WN 154 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 16
Reciprocal Enforcement of Judgments Act 1958 ss 3(3), 5(1)(a)(i), (iii), (iv), (v), (vi), (b)
Rules of Court [Sing] O 65
Rules of the High Court 1980 O 11 r 2, O 65 r 2, (1)
Rules of the Supreme Court [UK] O 11 rr 5(2), 6(3)
Supreme Court Rules [Sing] O 11 r 4(2)(c)
Penal Code [Swiss] art 271

Clarence Edwin (RParam with him) (Zaid Ibrahim & Co) for the judgment creditor.
YP Wong (Lim Kian Leong & Co) for the judgment debtor.

Syed Ahmad Helmy J:

[1] Enclosure 2 is the judgment creditor's summons for registration of a foreign judgment under the provisions of the Reciprocal Enforcement of Judgments Act 1958 ('the Act'). Similar applications have been filed by the judgment creditor in two other related actions in Saman Pemula No MT–1 24–2217 of 2002 and MT–1 24–2218 of 2002. The judgment creditor had earlier filed an action in the High Court of the Republic of Singapore, which was registered as Suit No S1194/2001/L. As the judgment debtor is ordinarily resident outside the jurisdiction of the Singapore High Court, an order for leave to serve the writ in Malaysia was granted.

[2] The judgment creditor served the writ on the judgment debtor personally on 24 December 2001. The judgment debtor thereafter retained the services of a firm of solicitors in Singapore namely, Infinitus Law Corporation. Infinitus Law Corporation filed a memorandum of appearance on the judgment debtor's behalf.

[3] The judgment creditor thereafter proceeded to file a summons for summary judgment. The summons was heard and judgment was accordingly entered on 15 April 2002. The present application by the judgment creditor seeks to register that judgment as a judgment of this court pursuant to the provisions of the Act.

[4] The prerequisite for a judgment to be registered pursuant to the Act is that judgment must emanate from a superior court of a reciprocating country — see Part II of the Act, which deals with registration of judgments from reciprocating countries.

[5] The First Schedule to the Act names the Republic of Singapore as a reciprocating country and the High Court of the Republic of Singapore is deemed to be a superior court for the purposes of Part II of the Act.

[6] Part II of the Act applies to judgments of a superior court from a reciprocating, country only if the judgments satisfy certain criteria and the criteria is spelt out in s3(3) of the Act, which states:

> Any judgment of a superior court, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies, if —
>
> (a) it is final and conclusive as between parties thereto;
>
> (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
>
> (c) being a judgment from a country or territory added to the First Schedule pursuant to subsection (2), it is given after that country or territory is added to that Schedule.

[7] When is a judgment final and conclusive as between parties thereto? *Halsbury's Laws of England* (4th Ed) speaks of this requirement in the following manner:

> The judgment which it is sought to enforce must finally and conclusively determine the rights and liabilities of the parties to it so as to be res judicata in the country where it has been pronounced [see *Nouvion v Freeman* (1889) 15 App Cas 1, HL; *Plummer v Woodburne* (1825) 4 B & C 625; *Paul v Roy* (1852) 15 Beav 433; *Patrick v Shedden* (1853) 2 E & B 14].
>
> A judgment is not final and conclusive if the court which has pronounced it has power to rescind or vary it subsequently [see *Nouvion v Freeman* (1889) 15 App Cas I, HL; *Re Macartney, Macfarlane v Macartney* (1921) 1 Ch 522 at 531, 532; *Blohn v Desser* [1962] 2 QB 116]

[8] In the factual matrix herein it cannot be disputed that the judgment which the judgment creditor seeks to register in this case is a summary judgment. Patently, it is a final and conclusive judgment since it conclusively determines the rights and liabilities of both parties and hence is *res judicata* in Singapore. There is also a sum of money payable under the judgment, which is not a sum payable in respect of taxes, or a fine or penalty. Finally, Singapore was at the time of the judgment and still continues to be listed in the First Schedule of the Act as a reciprocating country. Hence the judgment which the judgment creditor sought to register in this case is a judgment to which Part II of the Act applies.

[9] The grounds upon which the registration of a foreign judgment may be challenged are set out in s5(1) of the Act which provides for seven grounds as follows:

> On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
>
> (a) shall be set aside if the registering court is satisfied:
>
> (i) that the judgment is not a judgment to which this Part applies or was registered in contravention of this Act;
>
> (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case;
>
> (iii) that the judgment debtor, being the defendant in the proceedings, in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
>
> (iy) that the judgment was obtained by fraud;
>
> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

(b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

[10] It is these grounds, and only these, on which the registration of a foreign judgment can be challenged. Any challenge that does not come within the ambit of the grounds Parliament has enacted in s5(1) is irrelevant, no matter how convincing it may appear.

[11] The factual matrix herein clearly excludes challenge on five grounds namely, s5(1)(a)(i), (iii), (iv), (vi) and s5(1)(b). Section 5(1)(a)(i) clearly does not apply as the judgment which the judgment creditor sought to register in this case is a judgment to which Part II of the Act applies. As for s5(1)(a)(iii), it has no application here because it deals with the case where the judgment debtor did not receive notice of the proceedings in the foreign court in sufficient time *and* did not appear in those proceedings. Insofar as s5(1)(a)(iv) is concerned, the judgment debtor has not alleged in any of his affidavits that the judgment was obtained by fraud. The judgment debtor has similarly not raised any issue in his affidavits that would fall within the scope of s5(1)(a)(vi) or s5(1)(b).

[12] Hence if at all a challenge can be mounted it would have to be based on s 5(1)(a)(ii) and (v) of the Act.

[13] The challenge mounted by the judgment debtor is three-fold — the first being that the service of the order for service of the writ of summons out of jurisdiction together with the writ of summons through a firm of advocates and solicitors, Messrs Shook Lin & Bok contravenes the provisions of O 65 r 2 of the Rules of the High Court 1980. The second ground is based on the illness and illiteracy of the judgment debtor in both English and Bahasa Malaysia respectively and the third ground is that the judgment creditor misrepresented and/or induced the judgment debtor to sign the guarantee.

[14] On the first ground of the judgment creditor's failure to comply with O 65 r 2 of the RHC 1980 it is only appropriate to reproduce same, which reads as follows:

2. Service of foreign legal process

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service of a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

(2) …

(3) … *Service shall be effected by the process server.*'

(Emphasis added)

[15] It is the judgment debtor's submission that by virtue of the aforesaid provision service of a foreign writ cannot be served in Malaysia by a private agent as the service has to be effected by the process server and relies on the cases of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474; and *Commerzbank (South East Asia Ltd) v Tow Kong Lian* [2002] 2 MLJ 353 which held that the foreign writ served through a private agent is invalid and not in compliance with O 65 r 2 of the RHC 1980 as it constitutes the exercise of foreign jurisdiction and encroachment into Malaysian sovereignty. Before proceeding with an in-depth discourse as to the basis and rationale behind the two cases cited by learned counsel for the judgment debtor it is also appropriate to stress that there are two other decisions of the High Court in the form of *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416 and *Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua* [2001] 5 MLJ 256 which decided to the contrary. Hence on this point there is a divergence of judicial precedents which invariably necessitates an analysis of the basis and rationale of the conflicting judicial precedents aforesaid.

[16] The divergence of views can be traceable and attributable to the statement on sovereignty of Lord Denning MR in *Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The 'Vrontados')* [1982] 2 Lloyd's Rep 241 which was referred to in both *United Overseas Bank Ltd (supra)* and *Commerzbank (South East Asia Ltd) (supra)* and which forms the basis of their decision that O 65 r 2 of the RHC 1980 prohibits service of foreign writs in Malaysia through the mechanism of private agents.

[17] The statement of Lord Denning MR was as follows:-

> As I have always understood it, service of writ out of the jurisdiction is an exercise of sovereignty within the country in which service is effected. It can only be done with the consent of that country.

[18] While these were the words of Lord Denning MR in *The 'Vrontados'* and reading it as they appear above may justifiably lead to the conclusion that a foreign writ cannot be served through a private agent, nevertheless it is my respectful view that these words cannot been interpreted outside the context in which they were uttered which was what happened in *Commerzbank (South East Asia Ltd) v Tow Kong Liang* [2002] 2 MLJ 353, where the learned judge said at p 363:

> That service of judicial process in a foreign country is an exercise of sovereignty in that country is well established. It was so held in *Afro Continental Nigeria Ltd v Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 by Lord Denning. It was so held by the Supreme Court in *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 and followed in *United Overseas Bank Ltd v Wong Hai Ong.* In relation to s 5(1)(a)(v) of the REJA and O65 of the RHC, Ian Chin J held:
>
> '... It goes without saying that Malaysia's policy like that of every other country is to protect its sovereignty and to expect foreign countries to respect it. For this

purpose, the said Rules had been enacted for the service of foreign legal process. It would be contrary to the public policy of Malaysia to condone a breach of the said Rules. Therefore, it would be contrary to public policy in Malaysia to allow the enforcement of a judgment that was obtained consequent upon a failure to observe the said Rules.'

For the removal of doubt, the issue of being contrary to public policy arises from allowing the enforcement of that judgment in Malaysia where an exercise of sovereignty has been made in Malaysia without its consent, and does not question the right of the judicial authorities in Singapore to make their own rules for actions and enforcement of judgments within Singapore in such cases.

[19] It is clear from the above passage the learned judge was of the view that the service of a foreign writ in Malaysia is an exercise of sovereignty in Malaysia, and as such can only be effected with Malaysia's consent which conclusion is similar to the conclusion arrived at in *United Overseas Bank Ltd v Wong Hai Ong* (*supra*). In order to ascertain the sustainability or otherwise of the conclusion arrived at by both the learned judges a visit to '*The Vrontados*' becomes inevitable.

[20] In *The 'Vrontados',* a Panamanian one-ship company owned the vessel called Vrontados. The company was called Meridian Shipping Co SA of Panama. The vessel was chartered out on a voyage charter. The owner's brokers were a company called Aegean 77 Shipping Co Ltd, which had an address in London. Under the voyage charter, the ship was to dock at Bangkok and load a cargo of bagged rice for carriage to a discharging port in Lagos, Nigeria. The vessel carried the rice to Lagos and discharged it there. But the cargo was seriously short and damaged by sea water and condensation. The cargo-owners, who suffered loss totalling $81,330, appointed London solicitors to recover the loss. The shipowner notified their P & I Club.

[21] Under The Hague Rules, a suit against a carrier or the ship in respect of any loss or damage must be brought within a year after the goods are delivered. The cargo-owners issued a writ against Meridian Shipping Co SA well within the limitation period. The company's address in Lloyd's Register of Shipping List of Shipowners was c/o Aegean 77 Shipping Co Ltd. The writ issued was for service within jurisdiction since Aegean 77 Shipping Co Ltd had its address in London. The cargo-owner's solicitors constantly reminded the P & I Club of the claim but the P & I Club put them off by saying that they were still investigating the matter. The writ, however, was not served because the P & I Club gave the impression that the matter could be settled.

[22] When the time bar was closer, the cargo owner's solicitors asked the P & I Club the position. They were informed that there was no proposal for settlement and that the file had not been considered for some time. The solicitors immediately prepared for service out of jurisdiction. They contacted their correspondents in Panama and got the names of the directors and officers of Meridian Shipping Co SA The correspondents also informed the

solicitors of an address in London and that Panamanian law required notice of the writ to be served on the President of the company, and if he was not in London, then service could be effected on another director or secretary.

[23] The solicitors then applied for and obtained an order for leave to issue and serve a writ out of the jurisdiction. Once the writ was issued, the solicitors attempted service on the Aegean 77 Shipping Co Ltd, whose address was registered as the company's address in London. A copy of the writ was left at the Aegean 77 Shipping Co Ltd, and a representative present at the time gave the solicitors the private address of the president of the company. The solicitors then went to that address but no one was there. A process server the solicitors appointed subsequently managed to serve the writ on another director of the company. The company instructed solicitors and applied to set aside the writ and service.

[24] The ground of the application was that the defendant was a Panamanian corporation with a registered address in Panama City, Republic of Panama. The company was a one-ship company and owned the 'Vrontados', which had been sold for scrap. The ship had not been replaced and the company had no other business. On these facts, it was contended that service of the writ on Aegean 77 Shipping Co Ltd was bad since all three company directors resided in London and could have been served without difficulty. At first instance, Justice Parker agreed, although he found the objections purely technical, and he set aside the writ and service. Leave to extend the validity of the writ was refused.

[25] Against this backdrop, the cargo-owner appealed to the Court of Appeal. Lord Denning MR, in his judgment, pointed out that the P & I Club having led the cargo-owner's solicitors '*up the garden path, they have slammed the door against them*'. With the promise of possible settlement, the P & I Club managed to string the cargo owner's solicitors along near the end of the time bar. Lord Denning MR then turned to consider the manner in which the writ should be served on a foreign corporation that does not carry on business within jurisdiction. The learned judge held that since the company had not established a place of business in London, the writ could not be served on it within jurisdiction. His Lordship said at p 251:

> But this Panamanian company never did establish a place of business here. Nor did it ever carry on business here. So it could not be served here by a writ for service within the jurisdiction. Not even by service on the president of the company if he was resident here, see *The Theodohos* [1977] 2 Lloyd's Rep. 428. It could only be served by service out of jurisdiction ... or by substituted service.

[26] Having decided that the company had to be served with the writ out of jurisdiction, Lord Denning MR proceeded to consider how service ought to be effected. The learned judge began by pointing out that a foreign corporation is domiciled in the same country as that in which it is incorporated. Having

pointed this out, Lord Denning MR proceeded to state that service out of jurisdiction is an exercise of sovereignty within the country in which service is effected and that it could only be done with the consent of that country. The learned judge continued to make the following statements that have been overlooked and which are pivotal to attaching the correct interpretation to the statement Lord Denning MR made on the sovereignty of states at p 252:

> That is why our rules provide for service through the judicial authorities of that country: or through a British Consular authority in that country, see RSC, O 11 rr 5(5) and 6. The practice is for the documents to be lodged here with the master's secretary who forwards them to the Foreign Office, see the *White Book* for 1982, p 109.
>
> If an individual is served ... by means of that machinery ... . In the foreign country, he need not be served personally so long as it is served on him in accordance with the law of that foreign country, e.g. by registered post addressed to him in that foreign country, see O 11 r 5(3)(a). But that only applies to individuals. *There is no similar rule to tell us how a foreign company is served out of jurisdiction.* In my opinion, it must be served in the country in which it is incorporated and domiciled. It must then be served ... through the machinery of our Foreign Office ... *in accordance with the way in which a company is served in its own country*. [Emphasis added]

[27] It is patently clear from that part of the statements above to which emphasis has been added that Lord Denning MR *was not* laying down a rule of law that service of a writ out of jurisdiction must be effected in the manner prescribed by the rules of court procedure applicable in the foreign country in which the writ is to be served. At all times, what was in the forefront of the eminent judge's mind was that *service out of jurisdiction must be effected in accordance with the rules of procedure in force in the country in which the writ was issued.* This is palpable from that part of the judgment where his Lordship says *'If an individual is served ... by means of that machinery (ie the machinery provided in the Rules of the Supreme Court) ... in the foreign country ... see O11 r5(3)(a)'* and the other part where the judge laments *'There is no similar rule to tell us how a foreign company is served out of the jurisdiction'*.

[28] Lord Denning MR to my mind was simply stating a very basic principle. That principle is plainly that courts exercise jurisdiction only within the territorial limits of their jurisdiction. Recognising that writs issued may need to be served on individuals residing outside the jurisdiction of the issuing court, and that such service is an exercise of jurisdiction in a foreign territory, the rules of procedure of the *issuing court* lays down specific machinery through which such service is effected. *It is this specific machinery that must be strictly adhered to when a party serves the writ out of jurisdiction.* If the machinery specifies that the writ is to be served according to the local law of the country, then that is what needs to be done. If on the contrary, the rules specify that it needs to be served personally on the defendant, then that is what is required. But to say that in every case, a writ for service out of jurisdiction can only be served in accordance with the procedure laid down in the rules practised in the courts

of a foreign country is something else. That *was* certainly not what Lord Denning MR meant when he said, '*... service of a writ out of the jurisdiction is an exercise of sovereignty within the country in which service is effected. It can only be done with the consent of that country.*'

[29] His Lordship did not mean that in every case, the issuing court must literally obtain the consent of the country in which service is to be effected. It is with the knowledge that the issuing court is treading on the jurisdiction of a foreign territory that *the rules of the issuing court provide for specific machinery for service* — and those rules are drawn up to avoid violent objections from foreign countries that an issuing court is freely and without inhibition traipsing in a foreign territory. It is unimaginable that a judge of Lord Denning's stature and eminence was unaware of a basic and ancient tenet in law that matters relating to the service of originating process are procedural and are determined by the *lex fori* (that is the law of the country in which the action is brought): *Dobson v Festi, Rasini & Co* [1891] 2 QB 92; *Melan v Duke de Fitzjames* [1797] 1 Bos & P 138; *British Linen Co v Drummond* [1830] 10 B & C 903; and *De la Vega v Vianna* [1830] 1 B & Ad 284. There is nothing in the judgment of Lord Denning MR that reflects an intention to deviate from the principle established in these cases and a proper reading of the judgment will only illustrate that his Lordship was merely endorsing the principle that a writ issued by an English court must be served in accordance with the rules of the English court regardless whether service is within or out of jurisdiction.

[30] Now our Supreme Court agreed with the judgment of Lord Denning MR in *Sunkyong International Inc v Malaysian Rubber Dvpt Corp Bhd* [1992] 1 CLJ (Rep) 310. In that case, the High Court issued a writ against a company incorporated in the United States of America (the first defendant) and a local company (the second defendant). The plaintiff sued the second defendant in its capacity as agent of the first defendant. The second defendant later applied and obtained an order to issue a third party notice against the first defendant. An order was also made permitting the second defendant to serve the third party notice on the first defendant in New York, USA through the second defendant's agents there. The issue before the Supreme Court was whether a third party notice issued by the High Court here could be served in a foreign country in the manner provided by the order.

[31] Peh Swee Chin SCJ, delivering the judgment of the Supreme Court, immediately after setting out the facts, proceeded to quote extensively the relevant portions of O 11 of the Rules of the High Court 1980, which deals with the issuance of writs for service out and the method in which service of such writs is to be effected. The learned judge then said at p 315:

> As regards the particular procedural point mentioned at the outset, it concerns the actual method of service of the notice of the writ out of jurisdiction after an order of service out of jurisdiction is granted. This is provided by O11 r6 in particular, depending on whether or not there subsists the Civil Procedure Convention in

that foreign country where the service out of jurisdiction is intended to be effected. In the instant appeal, it was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore O11 r6(2) applied. The service of the notice of writ herein would have to be through Government of the USA or through our Malaysian Consular authority contrary to what was ordered and done in this case; as stated above.

The rationale behind the prescribed method of service is of course that our Courts do not exercise their judicial powers beyond their territorial limits, and further *service of judicial process in a foreign country,* to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 *is an exercise of sovereignty in that country,* which can only be done with the consent of that country. [Emphasis added]

[32] Two things appear from the passage aforesaid. *Firstly,* the Supreme Court was dealing with a case where a process issued by a Malaysian court is to be served out of jurisdiction, and as such, was *not dealing with how a writ issued by a foreign court should be served on a defendant residing in Malaysia, Secondly,* the Supreme Court made it clear that service out of jurisdiction is an exercise of sovereignty on foreign soil and that is the *'rationale behind the prescribed method of service'*. What prescribed method was Peh Swee Chin SCJ speaking of? It was the prescribed method in the Rules of the High Court 1980. The learned judge was stating that the originating process must be served according to the procedure spelt out in our O 11 of the Rules of the High Court, *and not* some rule of procedure relating to service practised in the courts of New York, USA. Why the need to strictly adhere to the rules of the *issuing court* for service out? Peh Swee Chin SCJ answers this at p 315 of his judgment by referring to the advice of a judge in an earlier English case of *Vaudrey v Nathan:*

Scrutton LJ in *Vaudrey v Nathan* [1928] WN 154 when advising circumspection in exercising power to allow service out of jurisdiction opined that *in some countries service out of jurisdiction to be effected there was looked upon with great disfavour.* [Emphasis added]

[33] In the circumstances by reason of the above analysis the conclusion arrived at by the learned High Court Judges in *United Overseas Bank Ltd (supra)* and *Commerzbank (South East Asia) Ltd (supra)* that a writ a foreign court issues must be served in Malaysia in accordance with the procedure spelt out in the Rules of the High Court 1980 lacks sustainability. A detailed scrutiny of *Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The 'Vrontados')* [1982] 2 Lloyd's Rep 241 and *Sunkyong International Inc v Malaysian Rubber Dvpt Corp Bhd* [1992] 1 CLJ (Rep) 310 which both judges cited in support of their conclusion in my respectful view does not support the proposition they advance as a close scrutiny of them in fact point to a very different and distinct conclusion.

[34] It is also noteworthy that the two contrary decisions of *Saeed U Khan (supra)* and *Tsang & Ong Stockbrokers (Pte) Ltd (supra)* it would appear was not referred to and considered by the learned judges in *Commerzbank (South East*

Asia Ltd) and *United Overseas Bank Ltd*. To disagree or dissent against a decision of a court of co-ordinate jurisdiction on an issue decided salient reasons must be laid out in the light of the cautionary note expressed by the Federal Court in *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 which cautioned that one High Court should not lightly disagree with a decision made by another High Court — thereby implying that there must be *considered grounds* for dissent.

[35] The same issue came up for consideration in *Saeed U Khan v Lee Kok Hooi (supra)* where a contrary conclusion from *Commerzbank (South East Asia Ltd)* and *United Overseas Bank Ltd* was arrived at. The learned judge, on the manner in which service of a foreign writ in Malaysia should be effected, said at pp420–421:

> In determining the validity of a judgment, the court must be satisfied that all procedural requirements of the country which issued the particular judgment in question have been complied with. In this case therefore, the court must be satisfied that service if the Singapore writ on the defendant complied with the provisions in the Singapore Rules of Court ('SCR'). The fact that the relevant provisions in this case are the SCR was acknowledged by the learned judge in *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474. With respect, the learned judge in that case erred in not applying the provision of O11 r 3(8)(a) of the SCR, by which it is provided that an originating process of Singapore may be served in accordance with r 4. Rule 4 provides that an originating process may be served by a method of service authorized by the law of that country for service of any originating process issued by that country. It cannot be disputed that service by way of a private agent is an authorized method of service in Malaysia. It is clear therefore, that the SCR permits the service of an originating process on a defendant in Malaysia by a private agent. In the case of *United Overseas Bank Ltd v Wong Hai Ongt* the learned judge did refer to O 11 r 3(8)(a) of the SCR, but proceeded to draw a distinction between processes originating in Malaysia and foreign processes. At p 415 of the report, the learned judge stated as follows:
>
> > 'Insofar as the Singapore O11 r 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malaysia in respect if processes originating in Malaysia and not to foreign process'.
>
> With respect, there is no basis for such a distinction. Order 11 r3(8)(a) of the SCR clearly permits service of a writ in Malaysia by a private agent. *Further, there is no provision in Malaysian law that prohibits the service of foreign process by a private agent*. [Emphasis added]

[36] The learned judge made it clear that the *validity of a judgment is dependent on whether the procedural requirements of the court that entered the judgment have been complied with*. The learned judge pointed out that the learned judge in *United Overseas Bank Ltd* recognised this. However, the judge found there was no basis for distinguishing the manner in which a locally issued writ and foreign writ is to be served here which was the conclusion of the judge in *United Overseas Bank Ltd*. The learned judge also pointed out that there is no provision in

Malaysian law that prohibits service of a foreign process by a private agent when he stated at pp 249–430:

> It is observed that counsel for the defendant relied heavily on the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 in support of their contention that service of the said writ of summons was bad in law. In the said case, the Malaysian High Court allowed the registration of the foreign judgment to *(sic)* set aside on the grounds that service of a foreign legal process through a private agent in Malaysia is not valid. It was held that 'whilst O 11 r 5(8) of the RHC allows service of our legal process in Singapore through the judicial officer of the courts there, the only permissible method of service of foreign legal process in this country, other than the method under O65 of the RHC is through O 11 r 3(8) of the SCR, which is service through our judicial officer of the courts here'. In arriving at his decision, the learned judge in that case relied on the Supreme Court decision in the case of *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] **2** MLJ 146. *I am of the opinion that the decision of the Supreme Court in Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd was wrongly applied in United Overseas Bank Ltd v Wong Hai Ong. With respect, the learned judge in United Overseas Bank Ltd v Wong Hai Ong failed to distinguish between the issue in the case of Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd and that in United Overseas Bank Ltd v Wong Hai Ong. In Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd, the issue was the service of Malaysian legal process on a foreign defendant by private agents.* In that case, the Supreme Court disallowed such a method on the grounds that it was not one of the prescribed methods in the Malaysian RHC (ie O 11 of the RHC). *In the case of United Overseas Bank Ltd v Wong Hai Ong, however, as in the instant case, the issue was that a foreign plaintiff who had served a legal process on a Malaysian defendant by way of a private agent. The Supreme Court in Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd did not address the issue of service of a foreign legal process on a Malaysian defendant.* Hence, I am of the opinion that the learned judge in *United Overseas Bank Ltd v Wong Hai Ong* with respect, erred in ruling that the decision in *Sunkyong* was applicable to the case before him. *It must be observed that the decision in Sunkyong only ruled out service of a Malaysian legal process on a foreign defendant by private agents and that the decision should be confined to similar fact situations. There is no restriction on service of a foreign process by a private agent on a defendant in Malaysia.* [Emphasis added]'

[37] The judge pivoted his conclusion that the Supreme Court in *Sunkyong* did not decide that a foreign writ could not be served on a Malaysian defendant by means of a private agent. The Supreme Court only decided that a writ issued by a Malaysian court could only be served out of jurisdiction in the manner provided by our rules of court. At the time *Sunkyong* was decided, the prescribed method was through official routes, such as a Malaysian consular officer or through the government of the foreign country. If *Sunkyong* were decided today, the outcome of the case would have been very different since the Rules of the High Court 1980 now provides that a writ can be served out of jurisdiction by a private agent the plaintiff appoints to effect service as conferred by O11 r2 of the RHC 1980 post PU(A) 342/2000.

[38] The same objection was put forward in *Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua* [2001] 5 MLJ 256. In that case, a Singapore judgment was registered as a judgment of the High Court in Sabah and Sarawak. The defendant, relying on *United Overseas Bank Ltd v Wong Hai Ong,* contended that the Singapore judgment was irregular because the writ was not served in accordance with O65 of the Rules of the High Court 1980. The learned judicial commissioner coins the defendant's contention in that case as follows at p 260:

> The first issue is whether the writ of summons in the Singapore High Court No 1224 of 1996 was duly served on the defendant.
>
> It is the defendant's case that the Singapore judgment was irregularly obtained as the service of the plaintiffs writ was not proper and therefore the registration of the said Singapore judgment in the High Court in Kuching is invalid and a nullity.
>
> It is the defendant's contention that the service by an agent is bad in law as it is contrary to O 65 r 2 of the RHC. The defendant is relying on the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 which rules that the service of a foreign legal process through a private agent in Malaysia is not valid. The learned judge in that case referred to the Supreme Court decision of *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 ... .

[39] The learned judicial commissioner found that the Supreme Court did not rule that a foreign writ could not be served in Malaysia through a private agent. This prompted the learned judicial commissioner to say at p 261:

> Reading through *Sunkyong*'s case, I could not find any ruling laid down by the Supreme Court that the foreign service of legal process in Malaysia could not be effected by a local agent. ...The interpretation of the Supreme Court in the abovesaid case was confined to O 11 r 6(2) of the RHC. Therefore the provision of O 11 r 2 must be strictly adhered to.

[40] The learned judicial commissioner then proceeded to consider the decision of the Singapore Court of Appeal in *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 1 SLR 633. In that case, the Singapore Court of Appeal considered the same issue, namely, the proper procedure to be adopted for the service of a foreign writ on a defendant in Singapore. In the court below, the learned judge held that a foreign writ must be served in Singapore in accordance with the procedure set out in O 65 of the Rules of Court (similar to our O65 of the Rules of the High Court 1980). LP Thean JA summarised the respondent's main contention in the Court of Appeal which appears in p 724 as follows:

> The main contention urged upon us by counsel for the respondents is that service of foreign process in Singapore is an encroachment upon the rights of sovereignty of Singapore and that such service can only be effected through official channels and not by a private agent In support, he relies on the following cases: *The Sky One; Ferrarini SpA & Ors v Magnol Shipping Co Inc* [1988] 1 Lloyd's Rep 238, *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146, *Ong &*

Co Pte Ltd v YL Chow Carl [1987] 1 SLR 304; [1987] 2 MLJ 430 and *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474.'

[41] The Court of Appeal proceeded to consider the cases counsel for the respondents relied on and found that *none* of the cases was authority for the proposition that service of a writ out of jurisdiction must always be effected through official channels. Of *Sunkyong* and the Singapore case of *Ong & Co Pte Ltd v YK Chow Carl* [1987] SLR 304, LP Thean JA said at pp 727 and 728:

> *The first thing to note is that both Sunkyong and Chow involve the interpretation of the respective provisions governing the service of process out of jurisdiction and they do not concern the interpretation of O 65 or its Malaysian equivalent.* It appears to us that the primary concern of the judges in these cases was that the procedure set out in O 11 prescribing the methods of service of process in a foreign jurisdiction must be strictly adhered to. Understandably, they were sensitive to the possibility that the foreign state might view such a service of process as being an encroachment upon its sovereign rights.
>
> *What counsel for the respondents now seeks to do is to extrapolate a general principle from these cases to say that service of process on a foreign state must always be effected through official channels.* To be more precise, his argument is that the service of any foreign process in Singapore would be an encroachment upon the sovereignty of Singapore, unless such service is effected through an official channel. *We do not think that the principles enunciated in those cases necessarily lead to such a conclusion. Ultimately, it would depend on whether the country, where the service of process is to be effected, treats the service of process by a private agent as an encroachment upon its sovereign rights*. [Emphasis added]'

[42] In *Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua* [2001] 5 MLJ 256, the learned judicial commissioner considered this and other pertinent paragraphs from the Court of Appeal's judgment in *Fortune Hong Kong Trading Ltd*. His Lordship then proceeded to quote an observation by the Supreme Court in *Sunkyong* that in the future our Rules may allow service of our writs in a foreign territory through a private agent.

> The restrictive nature of our O 11 r 6(2) of the RHC is acknowledged by the Supreme Court in *Sunkyong*'s case where they made this observation:
>
> 'It is possible that the Civil Procedure Convention is held or signed in future could contain methods of service less demanding on our foreign missions that as set out in O 11 r 6(2), eg even by the method of service as ordered by the learned registrar and upheld by the learned judge, with our present world having shrunk in these days and times and boundaries of nations consequently having been regarded with a more realistic pitch of fever.'

[43] The learned judicial commissioner then went on to note that the Supreme Court's observation in *Sunkyong* is now *fait accompli*. The learned judicial commissioner pointed this out when he said at p 262:

> It is interesting to note that the abovesaid observation has turned into reality by the amendment to O 11 r 2 of the RHC which introduced 'the service by the

plaintiff or his agent whenever authorized by the law of that country' *vide* PU(A) 342/2000 effectively from 22 September 2000.

and then concluded at p 262:

In the application before me today the plaintiffs prefer the mode of service under O 11 rr 3(8) and 4(2)(c) of the RHC over O 65 r 2 of the SCR to serve their Singapore judgment *(sic)* by using the service of their local agent in Kuching.

Order 11 r 4(2)(c) of the SCR allows 'the service by a method of service authorized by the law of that country for service of any originating process issued by that country.

Service by a local agent (other than by court process server) is a recognized mode of service by our court here. Therefore, the service of the Singapore judgment *(sic)* is good in law. Hence the said judgment *(sic)* is duly served on the defendant.

[44] The learned judicial commissioner also proceeded to point out that the validity of a foreign judgment should not be questioned in our courts, unless of course it can be shown that the judgment was obtained by fraud [see s5(1)(a)(iv) of the Reciprocal Enforcement of Judgments Act 1958]. The validity of a judgment can only be challenged in the court that entered the judgment. This fundamental principle was overlooked in both *United Overseas Bank Ltd v Wong Hai Ong* and *Commerzbank (South East Asia Ltd) v Tow Kong Liang* but learned judicial commissioner stated the principle lucidly when he said at pp 262–263:

It is also not the function or duty of this court to consider the validity of the Singapore judgment. If the defendant is not happy with it he should go back to Singapore High Court to challenge the validity of the said judgment. In the event he succeeded there the order of registration of the said judgment would be revoked accordingly. It is pertinent to note that the defendant had not to date done anything about this.

Unless that is done 'A judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice'. (See *Anthinarayana Mudaliar v Ajit Singh* [1953] MLJ 229.)

[45] To digress shortly, in the present case, the judgment debtor has not alleged that the proceeding conducted in the High Court of Singapore offended the rules of natural justice. As to whether the High Court of Singapore had jurisdiction in this case, that is evident from the fact that the judgment debtor appointed solicitors to represent him in those proceedings. In doing so and in filing a memorandum of appearance, the judgment debtor voluntarily submitted to-the High Court of Singapore. The High Court of Singapore plainly, in light of these facts, had jurisdiction over the subject matter.

[46] Coming back to chief issue, that is whether the service of a foreign writ must be effected on a defendant in Malaysia in accordance with O65 r 2, it is important to consider the ambit of that rule. The ambit of the rule is found in O 65 r 2(1), which states:-

> *This rule applies* in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country *where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister* and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request. [Emphasis added]

[47] The ordinary grammatical and literal meaning of the words to which emphasis has been added is evident. O 65 r 2 only applies when the minister receives a letter of request from a foreign tribunal seeking assistance to serve a foreign process on a person in Malaysia. By no stretch of imagination can the scope of the rule be extended to mean that in every case pending before a foreign tribunal and the defendant is in Malaysia, the foreign process must be served in accordance with the procedure set out in O 65 r 2. Order 65 r 2 can only operate where a foreign tribunal sends a request to the Minister to assist in serving the foreign process, and its ambit does not extend beyond this. It does not contain a peremptory order to foreign tribunals to send a request to the Minister in every case where a foreign process is to be served on a defendant in Malaysia. The Singapore Court of Appeal accorded the same interpretation to O 65 r 2(1) of the Singapore Rules of Court, which is *in pari materia* with O65 r 2(1) of the Rules of the High Court 1980. LP Thean JA in the case of *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 2 SLR 717 said at p 724:

> Giving the rule its plain and ordinary meaning, we are firmly of the opinion that the rule applies only *where* a letter of request for service from a foreign court or tribunal is received by the Minister for Law and is subsequently sent by him to the Supreme Court with an intimation that it is desirable that effect should be given to the request. In cases where no such letter of request is received, r 2 simply has no application. ... It seems to us that O 65 r 2 is not intended to govern the service of *all* foreign processes in Singapore issued by the courts or tribunals of non-convention countries.

[48] Now it is clear that a private agent cannot serve a writ in a foreign territory if the laws of that territory expressly prohibit that. This much is clear from the case of *Ferrarini SpA & Ors v Magnol Shipping Co Inc (The "Sky One")* [1988] 1 Lloyd's Rep 238. In that case, a vessel loaded a general cargo comprising largely of marble at Italy. The cargo was to be shipped to Jeddah in Saudi Arabia. A Panamanian corporation owned the vessel. The vessel sailed with the cargo but 5 days later, she sank. The plaintiffs, who were the cargo-owners, argued that this must be due to the age and unseaworthiness of the vessel. The shipowner's argued that the vessel must have collided with an unidentified

underwater object since the United States Sixth Fleet, possibly followed by submarine observers, was in the waters where the vessel sank. The plaintiffs issued a writ against the shipowners and the writ was served through a private agent on the president of the Panamanian corporation in Lugano, Switzerland. The owners applied to set aside the service of the writ. Staughton J, after narrating the facts, proceeded to consider the relevant provisions of the English Rules pertaining to service out of jurisdiction. Now, O 11 r 5(2) and r 6(3) of the English Rules respectively provide:

> Rule 5(2) Nothing in this Rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected with is contrary to the law of that country.
>
> Rule 6(3) Where in accordance with these Rules a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court the writ may be served …
>
> (a) through the government of that country, where that government is willing to effect service; or
>
> (b) through a British consular authority in that country, except where service through such an authority is contrary to the law of that country.

[49] Having considered these two provisions, the learned judge said at pp241–242:

> It is common ground that the methods of service provided in that sub-rule are not exclusive. Service may be effected by private means rather than through the Master's Secretary's Department, the Foreign and Commonwealth Office and diplomatic channels provided always that nothing is done in the country where service is to be effected which is contrary to the law of that country. So the question is whether service by private means in Switzerland is contrary to the law of Switzerland. [emphasis added]

[50] After framing this question, Staughton J pointed out that Art 271 of the Swiss Penal Code prohibited any person from doing an act on behalf of a foreign state within Swiss territory. The learned judge then concluded at p 245:

> In my judgment, private service of an English High Court writ would, in Swiss law, be considered an act for a foreign state and therefore a breach of art 271, since it conveys to the defendant the command of the sovereign of the United Kingdom (once expressly included in the writ, now tacit) to appear in the English Court. ... Itherefore hold that service of the writ by Dr Rossi was a breach of Swiss law. By reason of O 11 r 5(2), it cannot be held to have been authorised by the order of Mr Justice Turner.

[51] The question for this Court to decide is whether there is any provision in Malaysian law that prohibits the service of a foreign writ on a defendant in Malaysia through a private agent. The judgment debtor contends that the

prohibition is in O 65 r 2(1) of the RHC. This contention is, with respect to learned counsel for the judgment debtor, devoid of merit. *There is nothing in the wording of O 65 r 2(1) that suggests that service of a foreign writ on a defendant in Malaysia through a private agent is prohibited.*

[52] Further, and more importantly, the Rules of the High Court 1980 is a subsidiary legislation made pursuant to the powers conferred by the parent Act, namely, the Courts of Judicature Act 1964 ('CJA'). It is common knowledge that the CJA only empowers the Rules Committee to make rules of procedure for the purposes specified in s16 of the CJA. That section provides that rules of court may be made, *inter alia,* for regulating and prescribing procedure and the practice to be followed in the High Court, the Court of Appeal and the Federal Court in all causes and matters, or for regulating and prescribing the procedure on civil and criminal appeals from any court or person to a High Court, the Court of Appeal and the Federal Court. But not one of the 15 limbs in s16 of the CJA give the Rules Committee the power to make rules to prohibit the service of a foreign writ on a defendant in Malaysia through a private agent.

[53] The Rules Committee, consequently, could not possibly make rules of procedure to prohibit the service of a foreign writ in Malaysia save in accordance with the procedure set out by the Rules Committee in the RHC. The decision to impose any such prohibition is a matter solely within the purview of Parliament, and not the rules committee, which has been set a very specific and distinct task. If Malaysia views the service of a foreign writ on Malaysian soil as an encroachment of her sovereignty, Parliament, which has power to make laws concerning the relations between Malaysia and foreign States, must enact a substantive law to prohibit service outside the official channels. Such a prohibition certainly cannot emanate from a subordinate authority delegated only the task of making procedural rules. This realisation is what led the learned judge in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416 to state in no uncertain terms that *'there is no provision in Malaysian law that prohibits the service of foreign process by a private agent.*

[54] In addition, one cannot begin to fathom how the Rules Committee could, on the one hand, authorise the service of a Malaysian writ on foreign soil through a private agent, while on the other hand, refuse to accord reciprocity of treatment to foreign writs served on a defendant in Malaysia by a private agent. If the Rules Committee viewed the service of a foreign writ in Malaysia as an encroachment on Malaysian sovereignty, it would likewise not intentionally authorise encroachment on the sovereignty of a foreign state by authorising the service of a Malaysian writ in a foreign state by a private agent. It is evident from this that the Rules Committee never did enact a rule prohibiting the service of a foreign writ in Malaysia by a private agent. What the Rules Committee provided for was merely the procedure to be adopted by the Malaysian court when a request is received from a foreign tribunal requesting assistance to effect service. That is all that can be said of O 65 r 2 of the RHC.

[55] Learned counsel for the judgment debtor has also submitted that *United Overseas Bank Ltd v Wong Hai Ong* has some weight because of the recent Court of Appeal decision in *Ngan Chin Wen v Panin International Credit (S) Pte Ltd* [2003] 3 MLJ 279. On this score I beg to disagree. The issue before the Court of Appeal in that case was purely whether a stay of execution should be granted pending the hearing of an appeal to the Court of Appeal against an order of the High Court registering a judgment obtained in the High Court of Singapore. One of the grounds to be satisfied for the grant of a stay is that the appellant has an arguable case. One of the issues to be argued in the appeal proper was whether the service of the Singapore writ in Malaysia through a private agent was invalid. As there were conflicting High Court decisions on this point, the majority of the Court of Appeal (Mohd Saari and Mokhtar Sidin JJCA) held that the appellant had an arguable case.

[56] A proper reading of the majority judgment in *Ngan Chin Wen* will show that there is nothing in it leaning in favour of *United Overseas Bank Ltd v Wong Hai Ong*. The majority judgment for all intents and purposes was neutral on this point and this is evident from the following passage in Mohd Saari JCA's judgment at p 574:

> However, in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416, the learned trial judge disagreed with the *ratio* in *United Overseas Bank*. Be that as it may, for purpose of this proceeding, in view of the conflicting decision, it affords a ground for the appellate court to determine the issue, meaning the applicant had an arguable case.

[57] The majority only concluded that there was an arguable case *but did not go beyond that in the judgment to consider the issue whether service of a foreign writ in Malaysia could be effected by a private agent*. The dissenting judgment of Abdul Aziz JCA is noteworthy as after having considered in detail the authorities on both sides he concluded that there was no arguable case because service of a foreign writ in Malaysia could be effected by a private agent. Abdul Aziz JCA also made the salient observation that the Malaysian court should not adjudicate on the judgments of a foreign tribunal, a point that has been discussed earlier. This is what his Lordship said at pp 577–578:

> The irregularity and consequent invalidity of a foreign judgment is not specified in the Act as a ground for setting aside the registration of the foreign judgment. I was of the view that the reason for that is because *the courts of one country should not adjudicate on the judgment of the courts of another country. If you have grounds to invalidate a foreign judgment, you must apply to the original court to set aside the judgment or you must appeal to the appellate court of the original court.* If you do not do so, the registering court has to accept the judgment as regular and cannot entertain any attempt to show that it is not. [Emphasis added]

[58] It, is clear that the decision in *Ngan Chin Wen* does not support the judgment debtor's contention that the judgment is irregular because service of the writ was effected through a private agent. On the contrary, only the dissenting judgment reasons out these issues and concludes that the proposition the judgment debtor seeks to advance here is untenable.

[59] For the foregoing reasons, I am of the considered view that the service of the writ on the judgment debtor in Malaysia through a private agent is proper and valid.

[60] On the second ground of the judgment debtor's challenge that the application for registration of the Singapore judgment on the grounds of illness and illiteracy much need not be said of these grounds of challenge since neither have any basis in law. The grounds on which the registration of a foreign judgment is disallowed are clearly spelt out in s5(1) of the Reciprocal Enforcement of Judgments Act 1958. The judgment debtor's alleged illness or illiteracy is not grounds recognized in s5(1) of REJA to disallow the registration of a foreign judgment.

[61] On the third ground that the judgment creditor induced the judgment debtor to sign the guarantee through misrepresentation would to my mind go towards requesting the registering court to consider the merits of a foreign judgment which to my mind cannot be entertained by this court. Misrepresentation, or any other substantive defence, is not a ground specified in s5(1) of REJA to disallow registration of a foreign judgment which to my mind cannot be entertained by this court. In point of fact, it has been said time and again that a foreign judgment cannot be impeached on its merits. This is an established principle in conflict of laws. In *MBf Finance Bhd v Yong Yet Miaw & Anor* [1991] 2 MLJ 320, Chao Hick Tin J reiterated that a foreign judgment is not impeachable on its merits and at p 322 referred to the following passage from *Cheshire & North's Private International Law* (11th Ed):

> It is well established that in an action on a foreign judgment the English Court is not entitled to investigate the propriety of the proceedings in the foreign court. Erroneous judgments delivered by a foreign court are not void in England. The merits of the case have been argued and determined and if one of the parties is discontented with the decision his proper course is to take appellate proceedings in the forum of the judgment. The English tribunal, in other words, cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties.

[62] A derivative of the above principle is that a registering court cannot give judgment on contentious questions of fact that were not raised in the original court. In *Bank of India v Trans Continental Commodity Merchants Ltd & Anor* [1986] 2 MLJ 342 the judge therein at p 346 cited with approval a passage from the judgment of Woodward J in *Ralli v Angullia* (1917) 15 SSLR 33 where the principle was stated as follows:

> In the case before us, the law of India with regard to wagering contracts being substantially the same as the law here, *the question at once arises, did the defendant raise the plea of wagering contract in India. If he did, we must take it that the Court decided against him:* for the judgment is presumed to be correct in law and fact, and it is not alleged that it was obtained by fraud. *If he did not raise the plea in India, presumably he could have raised it, and therefore he cannot raise it here,* whether it be owing to the

doctrine of estoppel or *res judicata or* because this court will not sit as a Court of Appeal from the Indian Courts ... . (Emphasis supplied).

[63] As Woodward J said, the question at once arises, did the judgment debtor raise the plea of misrepresentation in Singapore. If he did, it must be taken that the Singapore Court decided against him. The Singapore judgment is presumed to be correct in law and fact, and the judgment debtor has not alleged that the judgment was obtained by fraud practiced on the original court. If the judgment debtor did not raise the plea of misrepresentation in Singapore, presumably he could have raised it, and therefore he cannot raise it here. The judgment debtor cannot raise it here owing to the doctrine of estoppel and *res judicata* and because this court cannot sit as a Court of Appeal from the Singapore Courts.

[64] In application for registration of foreign judgment the court must be slow to refuse registration on tenuous grounds as it will lead to our judgments not being accorded reciprocity by the courts of reciprocating countries. This is the rationale behind s5(1) of REJA, which limits and specifies the grounds on which registration can be challenged. If we begin to widen the scope set out by Parliament in s5(1) of REJA, which is the very same scope in the legislation of reciprocating countries such as Singapore, then we can expect refusal to register our judgments in foreign courts on tenuous grounds. Even the public policy limb *(*must be interpreted restrictively because it is 'a *very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law'* [per Burrough J in *Richardson v Mellish* [1824J 2 Bing 229, quoted with approval by Eusoff Chin J (as his Lordship then was) in *The Aspinall Curzon Ltd v Khoo Teng Hock*: [1991] 2 MLJ 484. In the interest of comity of nations, the registration of a foreign judgment should not be refused on grounds not provided in s5(1) of REJA.

[65] For the reasons aforestated as the judgment debtor has failed to bring his case within any one of the grounds specified in s5(1) of REJA he has accordingly failed to illustrate why the judgment entered against him in the Singapore High Court should not be registered as a judgment of the High Court in Malaya. With the consequent result that there shall be an order in terms of the originating summons herein and also in the two related actions in Saman Pemula No (MT–1) 24–2216–2217 of 2002 and (MT–1) 24–2218 of 2002.

Order in terms.

Reported by AG Kalidas